

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 23, 2014

v

DWAYNN BERNARDO EPPERSON,

Defendant-Appellant.

No. 311933
Wayne Circuit Court
LC No. 12-001425-FH

Before: SAAD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and felonious assault, MCL 750.82. We affirm.

Defendant argues that there was insufficient evidence for a reasonable jury to find that the elements of felonious assault were proven beyond a reasonable doubt. Specifically, defendant argues that there was insufficient evidence that he possessed a dangerous weapon. We disagree.

This Court reviews de novo a sufficiency of the evidence challenge. *People v Harrison*, 283 Mich App 374, 377; 768 NW2d 98 (2009). There is sufficient evidence to sustain a conviction if, after reviewing the evidence in a light most favorable to the prosecution, it is determined that a rational jury could have found that the elements of the crime were proven beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). In addition, circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

“Felonious assault is defined as a simple assault aggravated by the use of a weapon.” *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993). “The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Defendant only argues that there was insufficient evidence for a jury to find that he possessed a dangerous weapon during the assault. Whether a defendant had possession of a dangerous weapon is a factual inquiry to be answered by the jury, and the prosecution can prove possession with circumstantial or direct evidence. *People v Flick*, 487 Mich 1, 14; 790 NW2d 295 (2010).

Viewed in a light most favorable to the prosecution, the evidence was sufficient to permit the jury to reasonably infer that defendant possessed a dangerous weapon, i.e., a knife or a sharp cutting-type instrument, when he assaulted Jeremiah Fish. Fish testified that he walked out of the house after arguing and fighting with defendant. He then heard Vanessa Wheatley yell, “[W]atch out.” Fish immediately turned around and saw defendant quickly approaching him. According to Fish, defendant thrust his right hand toward Fish’s abdomen, stabbing him. Fish testified that he felt a “piercing.” He looked down at his abdomen and saw blood. Fish did not see a knife or other weapon in defendant’s hands because defendant’s hands were covered by his coat sleeves. In addition, Fish asserted that he first saw blood on himself after defendant thrust his right hand toward his abdomen. After the assault, Fish was taken to Detroit Receiving Hospital and examined by Dr. James Tibursky. Tibursky observed a small, smooth, five to six inch deep wound consistent with a sharp object going in. Based on Tibursky’s observations and experience, he concluded that Fish’s wound was caused by a long, narrow, “cutting-type instrument” with sharp edges, “consistent with a knife.” A reasonable inference the jury could draw from the evidence is that defendant possessed a dangerous weapon when he assaulted Fish. A jury could reasonably infer that defendant concealed a knife or sharp cutting instrument under his coat sleeves and stabbed Fish. This inference is consistent with Fish’s testimony regarding his observations and defendant’s hand movements. It is also consistent with Tibursky’s testimony, i.e., that Fish’s wound was caused by a long, narrow, cutting-type instrument with sharp edges, similar to a knife. Accordingly, the evidence, when viewed in the light most favorable to the prosecution, is sufficient to establish that defendant possessed a dangerous weapon when he assaulted Fish.

In his Standard 4 Brief, defendant argues that the prosecutor abused her discretion by charging him with two assault charges based on a single incident. He also contends that the two assault convictions violate his right against double jeopardy because the convictions were based on the same conduct. Because these arguments are essentially identical, we consider them together.

A double jeopardy issue presents a significant constitutional question which will be considered on appeal despite a defendant’s failure to properly preserve the issue in the lower court. *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002). Nonetheless, to avoid forfeiture when not raised before the lower court, the defendant must show that plain error occurred which affected his substantial rights. *People v Barber*, 255 Mich App 288, 291; 659 NW2d 674 (2003).

The validity of multiple punishments under the double jeopardy provisions of the United States and Michigan Constitutions is generally determined under the “same-elements test,” which requires the reviewing court to determine “whether each provision requires proof of a fact which the other does not.” *People v Smith*, 478 Mich 292, 305, 315-316; 733 NW2d 351 (2007), quoting *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). The Michigan Supreme Court has determined that multiple convictions of assault with intent to do great bodily harm less than murder and felonious assault do not violate the constitutional double jeopardy protections because the two crimes have different elements. *People v Strickland*, 293 Mich App 393, 402; 810 NW2d 660 (2011), citing *People v Strawther*, 480 Mich 900; 739 NW2d 82 (2007). This Court is bound to follow decisions of our Supreme Court.

People v Hall, 249 Mich App 262, 270; 643 NW2d 253 (2002). Accordingly, there was no plain error affecting defendant's substantial rights.

In addition, the prosecution "is given broad charging discretion." *People v Conat*, 238 Mich App 134, 149; 605 NW2d 49 (1999). The prosecutor has discretion to bring any charges supported by the evidence. See *People v Yeoman*, 218 Mich App 406, 413-414; 554 NW2d 577 (1996). Defendant has failed to show that the charges of assault with intent to commit great bodily harm less than murder and felonious assault were not supported by the evidence; and therefore, we reject defendant's claim. Although defendant's convictions of assault with intent to commit great bodily harm less than murder and felonious assault resulted from the same incident, his convictions neither violated the prohibition against double jeopardy nor did the prosecutor abuse her discretion in charging defendant with both assault charges.

Affirmed.

/s/ Henry William Saad

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly